

Reconsideration of Steam Electric Effluent Limitations Guidelines (ELGs)

Overview of Confidential Business
Information Petition Issues

June 16, 2017



Reconsideration Briefings

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Legal Background on Confidential Business Information (CBI) and ELGs

- Section 308 of the Clean Water Act (“CWA”), 33 U.S.C. 1318, authorizes EPA to collect information in order to carry out its duties under the Act, including to develop an effluent limitation or pretreatment standard
- Section 308(b) also includes provisions designed to safeguard Trade Secrets
- EPA’s regulations at 40 CFR 2.209(a) require it to safeguard information designated as “confidential” (either because it is a trade secret or confidential business information) unless there has been a determination that the information does not qualify for such protection

Historical Use of CBI in ELGs and Associated Litigation

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CBI in the Steam Electric ELG Rulemaking Record

- In order to base the rulemaking decisions on sound information, EPA sent a survey to industry, and obtained information from certain vendors, including those who sell wastewater treatment technologies
- In their responses to EPA's survey, many power plants (many of which are members of UWAG) claimed at least some of the information relating to their plant processes, including wastewater management practices and flow rates, as well as their financial information, as CBI
- In some cases, vendors also claimed certain information, including information relating to the costs of their products, as CBI
 - These vendors volunteered certain information to EPA with the understanding that EPA would not disclose what the companies deemed as CBI
- Pursuant to CWA Section 308 and its regulations requiring the safeguarding of CBI, EPA removed (in whole or in part) from the public docket for the ELG Rule certain documents that contain information that power companies and vendors claimed as CBI
 - EPA often makes information publicly available using techniques such as aggregating certain data in the public docket (e.g., presenting totals, averages, or ranges of values) or masking plant identities to prevent CBI disclosure
 - EPA also withheld from the public docket additional information that, while not directly claimed as CBI, could – through deduction or reverse engineering – release information claimed as CBI, if made public (see Appendix for additional details)
 - EPA outlined and documented its approach to protect CBI information obtained for the steam electric ELG in its sanitization plan which it included in the proposed rulemaking record
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Industry Motion to Complete the Administrative Record

- In February 2016, certain industry petitioners (including UWAG) sent EPA a letter requesting that we release additional information that it “improperly withheld as CBI”
- In June 2016, these same industry petitioners filed a motion to “Complete the Administrative Record” arguing that EPA improperly withheld critical information in the record under the guise of CBI, and that EPA failed to make the “whole record” available for judicial review
 - Sought an order from the court requiring EPA to (1) reconsider all information withheld as CBI to ensure that only CBI has been withheld, (2) “complete” the public record by explaining its methodologies and analyses in full, and (3) submit declarations and a log verifying that only CBI has been withheld
- Prior to responding, EPA offered to UWAG to provide them the CBI under a protective order arrangement; UWAG declined
- In September 2016, EPA filed a response arguing that its efforts to protect CBI were reasonable and explained that it provided sufficient bases and explanation of its rationale in the public record
 - 490-page final technical development document, 189-page final non-CBI incremental costs and loads report and an almost 6,000 page comment response document
 - Moreover, EPA explained that it offered to make the contested information available to litigants under a protective order for purposes of the litigation; industry categorically rejected this offer
- In November 2016, the Fifth Circuit ruled that industry’s motion was “carried with the case.”

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CBI Issues in Industry Petitioners' Merits Brief (Cont.)

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Key Take-Aways

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Appendix

Example of CBI-Deducible Data

- Nine respondents (i.e., plants) operated by five companies provided production data associated with a certain wastestream. Three respondents claimed the production data as CBI, the other six did not. In order to protect the CBI data, EPA provided the aggregated average value for the nine respondents in its proposal documents. The breakdown of respondents at the plant and company level is as shown here:

Number of Plant Respondents to Question	Number of Company Respondents to Question
9 plants (total)	5 companies (total)
3 plants (assert CBI claims) – A, B, and C	2 companies (CBI): One operates A and B One operates C

- Only two companies submitted data with CBI claims. If EPA releases all waived, non-CBI production data, then the company operating plants A and B can determine plant C's CBI claimed response because it has access to eight of the nine responses and the average of the nine responses

Example of CBI-Deducible Cost Information

- EPA developed and presented in public documents equations to calculate plant-level costs for this rulemaking
 - In many cases, EPA presented the entire equation publicly; the only variables missing are plant-specific input values (CBI)
- Specific example: labor cost associated with operating chemical precipitation system to treat FGD wastewater
 - Operating Labor Cost = $0.2719 \times (\text{FGD Flow GPD} \times 365)^{0.7789}$
 - Only variable is the plant-specific internal flow rate
 - If a plant claims its internal flow-rate to be CBI and EPA released that plant's labor cost for that plant, one could back-calculate that plant's CBI flow rate